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In the Supreme Court of the United States

OCTOBER TERM, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

THE DELAWARE AND HUDSON RAILROAD CORPORATION, APPELLANT

ERIE-LACKAWANNA RAILROAD COMPANY, APPELLANT

CITY OF SCRANTON, APPELLANT

MILTON J. SHAPP, APPELLANT

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES, RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

JAMES WM. MOORE
ROBERT W. BLANCHETTE
JAMES W. GRADY
54 Meadow Street
New Haven, Connecticut 06506

JOHN N. WORCESTER
ARTHUR BLASBERG, JR.
ROBERT G. BLEAKNEY, JR.
MORRIS RAKER
225 Franklin Street
Boston, Massachusetts 02110

Of Counsel

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts 02110

Attorney for Appellees, Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor

December 30, 1966

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INTRODUCTION

The New Haven has not had any net railway operating income since 1957. It has been in bankruptcy since 1961. It cannot survive as an independent railroad.

The New Haven's rail operations, essential to southern New England, can be continued only as part of a merged Penn-Central system. Without the merger, there is no alternative to liquidation of the New Haven's properties and cessation of its present operations which annually serve 24 million passengers and the shippers of some 20 million tons of freight.

The Commission made preservation of the New Haven's operations a condition of its approval of the Penn-Central merger.[1] It found that delay in consummation of the merger would expose the New Haven's ultimate inclusion to the risk that the merger might never occur.

Conversely, the appellants raise no issues which entitle them to subject national transportation policy, public interest, and the economies of four states to the possibility of being deprived of the vital transportation artery which the New Haven represents.

The Commission's procedures have insured that the railroad appellants' ability to serve the public will not be impaired. Basically at issue is whether the completion of the Eastern District restructuring would so affect the financial interests of their respective security holders that the public interest in prompt consummation should be required to wait. Because of the financial stakes involved, these appellants seek to prevent consummation of the Penn-Central merger for as long as possible. No opprobrium need be attached to the jockeying by appellants for bargaining position *vis-a-vis* one another or Penn-Central — but the private in-

[1] Abbreviations of names of parties are in accord with those used in prior briefs or, in some instances, are distinctive portions of the corporate name of the party. The United States District Court for the Southern District of New York is referred to as the "district court." The opinion of the district court is referred to as "opinion," followed by appropriate page references to the typewritten copy.

terests of security holders cannot override the public interest.

Both the Commission and the district court have found that prompt consummation of the merger is essential in the public interest.

I. STATEMENT

A. THE NEW HAVEN AND ITS INTEREST IN THE PROCEEDING.

The New Haven is the largest railroad, and one of the largest business enterprises, in New England. It currently has gross revenues in excess of $120 million annually, employs in excess of 9,000 people, and has payroll costs in excess of $81 million. (R.692)

On a national basis, the New Haven is the fourth largest privately-owned, passenger-carrying railroad, and one of the largest non-trunkline freight railroads. In terms of operating revenues, it ranked thirty-fourth in a recent year among transportation companies of all types, including air, water and bus. (R.692) The New Haven is one of the nation's most important mail carrying railroads. (R.694)

The New Haven serves the states of Massachusetts, Rhode Island, Connecticut and part of New York, including New York City and environs. This area is one of intense economic activity and has a population of some 17,000,000. Forty-three communities served by the New Haven have a population in excess of 40,000, eight of them having over 100,000. (R.692)

The New Haven has freight connections at twenty-five locations with nine Class I railroads. At seven additional locations, it connects with ten terminal switch-

ing roads, New York harbor switching lines, or short line railroads. (R.693)

Passenger service is conducted by the New Haven on its main lines between New York City and Boston and between New York City and Hartford-Springfield, as well as on numerous branch lines. On a typical weekday it operates over 300 passenger trains. (R.693)

The passenger operation includes heavy density commuter service in both the New York City and Boston areas, serving approximately 14 million commuters annually. The New Haven operates some 160 suburban passenger trains each day, Monday through Friday, between the New Haven-Danbury-New Canaan area and New York City. (R.693, 697)

Through passenger service between Penn and New Haven points in the heavily travelled corridor between Boston and Washington is operated via the Hell Gate Bridge of the New York Connecting Railroad (jointly owned by Penn and the New Haven). (R.693)

The New Haven has an essential role in national defense. Over twenty military installations are directly served by the New Haven.[2] Its service area also includes a number of significant defense industries. (R.694)

During 1941-1945, it averaged over 34 million tons of freight per year and carried approximately 30 million passengers annually. It carried over 7.7 million troops in group rail military movements from 1942 through 1945, representing over 19% of the troops car-

[2]These include such establishments as Boston Army Base, Boston Naval Shipyard, Naval Submarine Base at New London, U. S. Coast Guard Academy, Westover Air Force Base, U. S. Naval Air Stations at Quonset Point, Rhode Island and South Weymouth, Massachusetts and the U. S. Naval Base at Newport, Rhode Island. (R.694)

ried in such rail movements in the United States; and carried over 1,000,000 cars of freight into and out of Boston. Its freight tonnage in 1943 was equal to the load of 3,800,000 ten-ton trucks on New England highways. (R.693)

New England is particularly dependent upon freight transportation. It is a deficit area in terms of major industrial commodities, fuels and foodstuffs. It makes its living primarily through manufacturing and exporting products from imported raw materials. Some 90% of the value created by manufacturing in New England is on material that has to be brought into the region. The products thus resulting, however, are marketed largely outside of New England.[3] Because of the need for a great deal of transportation service, transportation costs are a significant part of manufacturing costs in New England. (R.694)

The New England manufacturer generally pays three separate types of transportation bills, each of which is frequently larger than that paid by its competitors located elsewhere in the United States. One transportation bill is paid for the importation of fuel, either consumed directly at the factory or by electric utilities which provide energy; another bill is paid for the carriage of the materials which are to be processed; and, finally, a third bill is paid for delivery of the manufactured products to their market. (R.694-695)

In the administrative hearings, some seventy witnesses testified to New Haven's economic, social and

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[3]Inbound freight movements consist largely of bulk and raw materials and semi-finished goods, while the outbound traffic is of finished, manufactured products. The latter are generally low in volume but high in value per pound. Because of this characteristic, the New Haven terminates considerably more traffic than it originates.

financial significance to the region it serves. Of these, forty-two freight shippers and receivers gave detailed evidence as to the effect upon them if New Haven's freight service were terminated, including such examples as the following (R.695-696):

United States Rubber Company: " . . . for that railroad to go out of existence, one way or the other would be quite disastrous to our company."

William B. Meyer, Incorporated: " . . . it would be of catastrophic proportions to our business."

Connecticut Coke Company: "It would mean one thing, that we would be finished."

Dow Chemical Company (Allyn's Point Division): " . . . we would be faced with an almost impossible operating condition."

Heublein, Inc.: " . . . our additional cost of this one item alone could approach . . . $1,040,000 annually."

Rogers Corporation: " . . . would place this Company in a poor competitive position and result in a sharp loss of business with the consequent curtailment of operations and reduced labor force."

Arnold Bakers, Inc.: " . . . would undoubtedly force Arnold Bakers, with its large volume of rail freight, to move elsewhere."

Hubbard-Hall Chemical Company: " . . . it would be accepted by us as a signal to move out of New England."

United Aircraft Corporation: " . . . it would greatly hinder our corporation's economical as well as physical operations."

The New Haven has been in reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. 204) since July 7, 1961.[4] The last year in which the New Haven

[4] *In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor,* Docket No. 30226 (D. Conn.). Richard Joyce Smith, William J. Kirk and Harry W. Dorigan took office as Trustees on August 3, 1961. Mr. Dorigan died in 1966.

realized net railway operating income was 1957; deficits since that date have ranged between $3.9 million in 1958 and $19.6 million in 1961. It has also suffered a deficit in income available for fixed charges in every year since 1958; such deficits have ranged from $1.7 million in 1959 to $12 million in 1961. (R.697)

During trusteeship, the results of operations have been as follows (R.697-698):

	Deficit in millions of dollars				
	1962	*1963*	*1964*	*1965*	*1966**
Net Railway Operating Income	($11.5)	($10.1)	($17.1)	($16.0)	($7.9)
Income Available for Fixed Charges	($ 5.1)	($ 4.9)	($ 8.3)	($ 8.4)	($4.1)
Net Income	($12.7)	($12.3)	($15.3)	($15.1)	($7.7)

*7 months ending July 31.

After their first six months, the Trustees reported to the reorganization court their views as to formulation of a plan of reorganization. They said: " . . . service on the New Haven lines cannot be contemplated as a permanent continuing function unless it is merged with a Trunk Line railroad. This, in our opinion, must not merely be a physical interconnection, but a full and complete corporate merger. Only then can the disadvantages inherent in the New Haven's terminal characteristics be overcome." (R.681)

This report preceded the March 9, 1962 filing with the Commission of the joint merger application of Penn and Central. In June, 1962, the Trustees intervened in the merger proceeding and petitioned for inclusion of the New Haven in the proposed Penn-Central system under Section 5(2)(d) of the Interstate Commerce Act (49 U.S.C. § 5(2)(d)). They have since actively participated in the proceeding. (R.682)

Fundamentally, the Trustees' petition for inclusion was based on a single factual contention: that a merger of Penn, the New Haven's most important interchange connection, with Central, one of the New Haven's most important competitors, and its only through line competitor, would divert a substantial amount of freight traffic from the New Haven. (R.682)

Shortly after the administrative hearings first closed, the Trustees commenced negotiations with Penn and Central which culminated in a memorandum of understanding regarding New Haven's inclusion. This provided that, subject to consummation of the merger, the New Haven's assets, except primarily current assets, would be conveyed to the Penn-Central system for a specified consideration.[5]

On April 27, 1966, the Commission served its report and order, dated April 6, 1966, approving the Penn-Central merger.[6] It found that:

> "Without some radical change in circumstances, even if this merger application were denied, NH would face a nearly insuperable task in bringing itself out of bankruptcy. The Transportation Company, with new routings and improved service, could undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in perhaps an irretrievable situation." (327 I.C.C. at 522)
>
> "... this merger, without complete inclusion of NH, would not be consistent with the public interest, and, accordingly, we will require all the New Haven Rail-

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[5] A detailed agreement covering all the terms and conditions of the conveyance was executed by the Trustees, Penn and Central on April 21, 1966. It was amended October 4, 1966 to reflect the Commission's reports and orders.

[6] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475.

road to be included in the applicants' transaction."[7] (*Id.* at 524)

The Commission directed that a plan for inclusion of the New Haven be filed by October 27, 1966. It also reserved jurisdiction to require, if the parties did not agree, that the inclusion be accomplished upon such fair and equitable terms and conditions as the Commission might fix, subject to approval by the reorganization court. (*Id.* at 553)

Upon the petition of the appellants and others, the Commission found in its report on reconsideration, dated September 16, 1966:

> "If consummation of the applicants' merger is deferred several years or indefinitely, we can have no assurance that it will ever occur. The factors that enter into an agreement to merge sooner or later can be affected by changing conditions. Absent the applicants' merger we see no solution to the New Haven problem. Certainly, neither of the applicants separately can be required to take over New Haven's deficit-ridden operations. We are not prepared to take this risk involved in a substantial postponement of consummation of the merger. Moreover, we are not prepared to take the risks which delay of consummation of even 6 or 12 months might entail in providing a solution of the New Haven problem other than liquidation." (328 I.C.C. at 312)

Inclusion of the New Haven in the Penn-Central system affords the only practicable means for reorganization of the New Haven that is consistent with the best

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[7] Concurrently with issuance of its report approving the Penn-Central merger, the Commission issued a report in *New York, N.H. & H. R. Co., Discontinuance of Trains*, 327 I.C.C. 151 (April 5, 1966). The Commission's report in the merger case incorporates, for purposes of certain findings, the findings in the passenger train case. (327 I.C.C. at 523-526) The Commission found that the public interest required continuance of substantial portions of the New Haven's passenger service and that the service should be included in the Penn-Central system. (*Id.* at 525)

interest of the public and of all parties interested in the New Haven estate.[8] (R.685) There is no alternative form of reorganization available which would preserve the service now rendered by the New Haven. (R.685) The Penn-Central system is the only trunk line carrier in whose operations the New Haven could be included within the foreseeable future. (R.685)

Until the Penn-Central merger is consummated, there is no secure harbor for the New Haven. Once the merged system has been created, the New Haven's rights to become a part of that system become fixed and enforceable, and the inclusion of the New Haven, whether as part of the Trustees' or some other plan of reorganization, can be duly carried out.[9]

B. THE APPELLANTS AND THEIR INTEREST IN THE PROCEEDING.

1. C&O-B&O SYSTEM

In June, 1960, C&O sought Commission approval to acquire control of B&O. Central intervened and also sought authority to acquire control of B&O. Early in 1962, the Commission permitted Central to withdraw its application and intervention, and in March, 1962, Penn and Central filed their application to merge.

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[8]The Trustees have made studies of the New Haven as an independent freight-only and passenger-only railroad. These studies show that the New Haven would not be a viable system for the long run as an independent freight-only railroad, even on the unlikely assumption that very large amounts of necessary new capital could be infused. (R. 685) The New Haven could not be operated as an independent passenger-only railroad for any period without full public underwriting of all segments of its operations. (R. 686)

[9]The Trustees' plan of reorganization and for inclusion was filed October 27, 1966, as required by the Commission's report of April 6, 1966. A pre-hearing conference was held by the Commission on December 19, 1966, and hearings are scheduled to commence on January 16, 1967.

Central and others[10] sought to have the C&O-B&O proceeding consolidated for disposition with the then pending N&W-Nickel Plate-Wabash merger proceeding and the Penn-Central merger proceeding. The Commission denied these requests and approved acquisition of control of B&O by C&O:[11]

> "The consolidation of this proceeding with the other two proceedings even for decision purposes or the withholding of a determination in this proceeding for simultaneous determinations in all proceedings would result in delays that would cause immediate serious injury to B&O and ultimately to the general public . . . [T]he present physical and financial condition of the B&O demands an expeditious disposition of the instant proceedings."[12]

The Commission's detailed reasons find a parallel in the New Haven's situation in the present case:

> "The record establishes that B&O's properties are in poor physical condition . . . [and] need to be rehabilitated. . . . Unless major improvements of B&O's properties are undertaken immediately, its ability to compete with other railroads and other modes of transportation will be seriously jeopardized. All temporary expedients to effect economies and promote efficiency appear to have been exhausted. Its failure to survive would deal a heavy blow to the shipping public in the 13 States and the District of Columbia within which it now operates and compound the inconvenience of travelers by elimination of its already greatly curtailed passenger service . . . Strengthened as a result of the control, B&O's ability to meet adequately the needs of commerce and of the

[10] Including, among others, D&H, the United States and the State of New York.

[11] *Chesapeake & Ohio R. Co. — Control — Baltimore & Ohio R. Co.*, 317 I.C.C. 216 (1962), upheld *sub nom. Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd*, 375 U.S. 216 (1963).

[12] 317 I.C.C. at 265.

national defense will be enhanced . . . We dare not ignore the threatening world situation. We consider that our approval herein will result in a financial strengthening of B&O and permit it to make improvements necessary to meet adequately the transportation service which it may reasonably be expected to provide. The needs of commerce and of national defense are of paramount importance to the country."[13]

In the subsequent court proceeding, the district court refused to set aside the Commission's order, notwithstanding the position of the United States that the Commission's order was erroneous and that the case should be remanded to the Commission for further proceedings, including a three-way consolidation with the N&W and Penn-Central cases.[14]

C&O has controlled B&O since 1963. C&O and B&O have an application pending with the Commission to control WM through termination of an independent voting trust holding some 43% of the WM stock of which they are beneficial owners. The Reading and CNJ are family lines of the C&O-B&O system. (R.187)

C&O, B&O, WM and Reading filed appearances early in the Penn-Central proceeding. Except for WM, they did not introduce evidence, and none opposed the merger in any respect. CNJ did not appear in the Penn-Central proceeding until after hearings were closed.[15]

On October 11, 1965, the N&W and C&O filed applications with the Commission to merge. (327 I.C.C. at

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[13] *Id.* at 290-291.

[14] 221 F. Supp. 19, 22, fn 2. The Department of Justice did not continue with that position in this Court.

[15] Exhibit H-109D in the record before the Commission shows that CNJ conceded that: "The Jersey Central will be strengthened by its interchange business with the improved stability of the two companies involved in the merger." (R. 813)

487) After the Commission's report and order of April 6, 1966 in the present case, C&O-B&O, WM, CNJ and Reading, while professing no basic opposition to the Penn-Central merger, asked the Commission to reopen the hearings to receive evidence of alleged traffic diversion, and to postpone consummation of the merger.[16]

The Commission concluded:

"CNJ, like N&W, made no appearance during the 2 years of hearings; and while C&O, B&O and Reading did appear, they chose to remain silent on the issue of adverse effects. Their expressions of discontent now interjected, more than 4 years after the merger application was filed and after petitioners had foregone the unusually lengthy opportunity to timely do so, come too late for serious consideration herein. Their measured and deliberate silence during the hearing support the inference that they saw more to be gained thereby in their own system-building aspirations than would result from forceful opposition likely to arouse counter opposition.

"Now, with the N&W-Nickel Plate merger and the C&O-B&O control transactions safely beyond challenge, and put into effect with remarkable success, petitioners have nothing to lose and perhaps much to gain by breaking their silence. Delay alone works in their favor. By requesting this 'second chance' to show adverse impact, petitioners are asking, in effect, that we begin anew to gather data and then practically to reappraise the entire merger. To this we cannot accede.

"We believe the petitioners are guilty of laches, and that nothing they now call to our attention warrants the further proceeding sought on this issue. We also believe the public is entitled to the benefits of this

[16]CNJ excused its lateness in entering the proceeding by saying that "in the beginning, it did not believe it would be adversely affected." Reading admitted that it had foreseen some diversion but had decided "that the time and expenses of computing and proving it would not have been justified." (328 I.C.C. at 316)

merger — and the applicants, to a final decision on it — without further delay." (328 I.C.C. at 317-318)

2. N&W SYSTEM

On March 17, 1961, N&W applied under Section 5(2) of the Act to form the present N&W system. It proposed to merge with the Nickel Plate, to lease the Wabash Railroad, to purchase the Sandusky line of Penn, to acquire control of the Akron, Canton & Youngstown Railroad and to lease certain properties of the Pittsburgh & West Virginia Railway.[17]

E-L, D&H and B&M opposed the N&W application, unless they were included.[18] Various public bodies, including the United States and the State of New York, supported E-L's application, and also asked that the proceeding be consolidated for hearing with the Penn-Central merger proceeding. (324 I.C.C. at 7-8, 17)

During the hearings, E-L withdrew its petition for inclusion and changed its intervention to one of support of the proposed N&W system.[19] E-L's withdrawal resulted from an agreement with N&W to enter into good faith negotiations for an affiliation between them, for the purchase of certain E-L securities and for construction and operation of a joint electronic freight classification yard at East Buffalo. (*Id.* at 19-20)

The withdrawal of E-L removed the physical connection between N&W on the one hand, and D&H and B&M on the other. As a result, while the proceeding

[17] Less than 16 months earlier, N&W was permitted to acquire the Virginian Railway by merger. *Norfolk & W. Ry. Co. Merger*, 307 I.C.C. 401 (1959).

[18] *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 29-32 (1964).

[19] After Penn and Central entered into their merger agreement, Central also withdrew from further participation in the N&W proceedings. (*Id.* at 7)

was pending, the inclusion requests of D&H and B&M were denied "without prejudice to renewal" if and when E-L should become directly involved.[20] In its report, the Commission provided that E-L, D&H and B&M could file petitions for affiliation with N&W within a 5-year period.[21]

The Commission held that it would not be "consistent with the public interest to approve the instant transactions without requiring the Pennsylvania to divest itself of its stockholdings in both the Norfolk & Western and the Wabash over a period of time . . ." (324 I.C.C. at 33-34).[22] Penn's voluntary acceptance of the Commission's condition requiring the divestiture of such securities permitted the N&W merger to be carried out.[23]

The arguments that the N&W-Nickel Plate-Wabash case should be consolidated with the Penn-Central proceeding were denied by the Commission on grounds advanced by the N&W that the Commission was required to consider its application independently of any other plan of unification, and that N&W's agreements

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[20] *Id.* at 30.

[21] The Commission provided that ". . . if the affiliation or affiliations then sought, or some reasonable modification thereof, be found consistent with the public interest, the Commission will direct the accomplishment thereof under such terms as may be found equitable to all parties involved". (*Id.* at 148)

[22] At the oral argument, N&W argued: "Our position is that the Pennsylvania Railroad does not control or will have control of the new Norfolk & Western system." Transcript of oral argument, *In the Matter of Norfolk & Western Railway Company and New York, Chicago & St. Louis Railroad Company — Merger, Etc.*, p. 15, April 22, 1964.

[23] Based on the December 31, 1963 closing prices on the New York Stock Exchange, Penn's ownership of N&W stock had a total market value of $283,024,742, (324 I.C.C. at 38) Penn's interest in Wabash stock on the same basis had a market value of some $95.6 million. (*Id.* at 42)

with Nickel Plate and others would expire and "the whole unification proposal under the present agreements will fail . . . new agreements would have to be negotiated under property values, market prices, and other conditions then prevailing which could render difficult the securing of the necessary stockholder approvals." (*Id.* at 17-18)[24]

No appeal was taken from the Commission's order authorizing the N&W merger.

On October 11, 1965, as noted above, applications were filed with the Commission for authority to merge C&O into N&W, claiming that this would bring about "true competitive balance in the East" and with Penn-Central.[25] However, only after the Commission's April 6, 1966 report did N&W seek intervention in the Penn-Central proceeding. It then asked for reconsideration of the April 6 report and order and that the merger be delayed.

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[24]"Against consolidation the principal arguments advanced by the Norfolk & Western and the Nickel Plate are that they are proposing no transaction with respect to either the New York Central or the Pennsylvania, that we are required to consider independently of any other plan of unification, the proposals which they have submitted, and that the present record is sufficient to enable us to arrive at a decision.

"The Norfolk & Western also cites the provision requiring its lease of the Wabash's properties to be consummated by March 1, 1966; and points out that its merger agreement with the Nickel Plate and the agreement for purchase of the Sandusky line are specifically conditioned upon consummation of the Wabash lease. Actually the last date for consummating the Wabash lease will be February 23, 1966, in order to permit the necessary filings and recordings with the Commonwealth of Virginia.

". . . It argues that since the Pennsylvania-Central merger case has not yet progressed to a decision stage, withholding or delaying a decision in the instant proceedings in order that they may be consolidated with the Pennsylvania-Central merger might well prevent permanently the consummation of these unifications." (*Id.* at 17-18)

[25]Joint Application of N&W and C&O, I.C.C. Finance Docket No. 23832, at p. 28; and see their brief herein, pp. 47-48.

3. E-L

During the hearings in the N&W proceeding, E-L withdrew its request to be included and thereafter supported N&W's application. (324 I.C.C. at 19) In its report, the Commission said:

> "Throughout almost the entire course of these proceedings, the Erie-Lackawanna and the applicants have joined in entreating us not to require Erie-Lackawanna inclusion but to approve the transactions as proposed, leaving to themselves the latitude to resolve the problems between them in due course of time. They have both bent their efforts toward developing a record to support a finding that the proposed transactions would be consistent with the public interest without Erie-Lackawanna inclusion at this time, considering that negotiations for Erie-Lackawanna inclusion later have been provided for." (*Id.* at 22)

The Commission viewed E-L's representations regarding its anticipated "good faith" negotiations with N&W, as follows:

> "As to how, when, and under what circumstances or terms it would be ready to negotiate, the Erie-Lackawanna has not been specific, except to point out that in the Erie-Lackawanna merger it required 4½ years to complete negotiations after the preliminary studies had been made, and that in any event, negotiations should be deferred until the Erie-Lackawanna can substantially improve its earnings position." (*Id.* at 21)

E-L has always asserted that it belonged in the N&W system. In its petition for inclusion in Penn-Central, dated January 10, 1963, E-L stated that it "will make every reasonable effort, and is convinced that the Norfolk and Western will make every reasonable effort, to accomplish an affiliation plan . . . "

The Commission gave E-L an absolute right to petition for inclusion in the N&W system. (*Id.* at 148) Although E-L could have instituted inclusion proceedings in the N&W case at any time after October 16, 1964,[26] it did not do so until September, 1965. During this period E-L informed the Commission of its "dramatically reduced deficit in 1964," and that "[t]he Erie-Lackawanna is doing even better in 1965 than in 1964." (E-L Exceptions, 62) The hearings on its petition for inclusion in N&W have been completed and a proposed report recommending its inclusion has been issued by Commissioner Webb.

In its September 16, 1966 report in Penn-Central, the Commission considered whether E-L would suffer adverse effects from immediate consummation of the Penn-Central merger:

> "the task of implementing a merger of this size is so vast and complex that its competitive effects will occur only gradually. We see no basis for disagreeing with the testimony of the chairman of both E-L and D&H (a former president of New York Central) in Finance Docket No. 21510, that E-L would not 'be substantially and adversely affected immediately upon consummation of [the Penn-Central] merger,' and that 'the effects would begin to be felt perhaps in the second year, and not in the first year'." (328 I.C.C. at 312)

4. D&H

D&H filed a petition dated January 28, 1963 for inclusion in Penn-Central. It then recognized that "its most appropriate affiliation is with the N&W system . . . " In its April 6, 1966 report, the Commission required that Penn grant to D&H trackage rights from

[26]The N&W merger was consummated on this date, and consummation constituted an "irrevocable assent" to the Commission's condition. (324 I.C.C. at 148)

Hagerstown, Maryland to Wilkes-Barre, Pennsylvania. This would give D&H a physical interconnection with N&W and create a new competitive route in the northeast. (327 I.C.C. at 527-528; see also 328 I.C.C. at 322-323)

As of December 31, 1963, D&H operated 744 miles of road, of which 619 were in the State of New York. (Examiners' report, 361, D&H appendix) It acts principally as a bridge carrier to and from B&M at Mechanicville, New York; and of its total volume of 423,563 carloads of freight handled in 1961, it interchanged 203,562 with B&M.[27]

The only question involved in D&H's reaching an agreement with N&W for its inclusion has been what it will get for its security holders. D&H's Chairman (who is now also Chairman of E-L) testified in the Penn-Central hearings that the reason for the breakdown in negotiations between N&W and D&H was "a matter of price."[28]

In its brief (at p. 4), dated September 19, 1966, in the reopened N&W proceedings, D&H admitted that its attempt to delay the Penn-Central merger is designed to protect its bargaining position with N&W:

> "Efforts were then made by D&H in 1965 to negotiate terms with N&W for D&H inclusion [footnote omitted] in the expectation of reducing the time which otherwise would be required in an adversary proceeding to effect its inclusion in N&W — and thus to reduce the delay in consummation of the Penn-Central merger, *which delay it obviously must seek in self-defense* until its own place in the Eastern merger situation is assured." (emphasis added)

[27] Although having joined E-L and D&H in petitioning the Commission for reconsideration of its April 6, 1966 report, and having joined E-L and D&H as a plaintiff in the district court, B&M is not an appellant here.

[28] Tr. 11,157, March 27, 1963.

D&H, like E-L, also had the absolute right to petition for inclusion in the N&W system after October 16, 1964, but did not do so until September, 1965. When E-L and D&H did file their petitions, the Commission ordered hearings on an expedited schedule. As previously noted, the proposed report of the Commission's hearing officer has issued and recommends that D&H be included in the N&W system.

5. C&EI

C&EI has trackage rights over Central's line between Pana and Granite City, Illinois. The underlying agreement provides that costs shall be shared in proportion to use. Central proposes to reduce its use of that segment of its line following its merger with Penn. (327 I.C.C. at 541)

C&EI sought to have the Commission fix its present charges as the maximum rent for the remaining 966 years of its trackage agreement with Central. The Commission provided that such ceiling remain in effect for one year following Central's routing changes, and retained jurisdiction to prescribe terms should the parties be unable to work out an arrangement for succeeding years. (*Id.*)

As to other contentions, the Commission said that "C&EI is unduly apprehensive of the applicants' ability to divert its traffic, and does not give adequate weight to its own ability to provide superior service in the pertinent areas of competition . . . And in the event its affiliation with Missouri Pacific is realized, C&EI will be further strengthened — as to finances, equipment, traffic, solicitation force and other important factors — further fortifying it against the competitive effects of applicants' merger." (*Id.* at 541-542)

6. SHAPP

Shapp has appeared in the proceeding as an individual. He relies here primarily upon testimony given by Leon H. Keyserling who appeared in the proceeding as a witness for Railway Labor Executives' Association.[29] The latter withdrew its objection to the merger prior to the Commission's decision, and has since ceased to participate in these proceedings.

7. CITY OF SCRANTON

Originally, Scranton was joined in its appeal before this Court by the Township of Weehawken, New Jersey, which has since withdrawn, and was joined in the district court by other municipalities.[30]

II. SUMMARY OF ARGUMENT

A. The Commission, which is charged with carrying out national transportation policy in determining applications under Section 5(2), has concluded not only that the Penn-Central merger is in the public interest but that it should be consummated without delay. (p. 24, *infra.*)

The railroad appellants seek delay in the interest of their security holders. Their bargaining position with each other or with Penn-Central ceases to be effective when the merger is consummated. Such private interests must be subordinated to furtherance of the public interest in securing an adequate transportation system. (p. 26, *infra.*)

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[29]Mr. Keyserling appears here as counsel for Scranton.

[30]Accompanying its brief is a "Joint Appendix" which sets out the purported oral argument of counsel Keyserling before the Commission on October 21, 1965. At page 5 of its brief below, however, Scranton makes clear that most of this was the *proposed* argument of counsel Keyserling which he distributed to the Commission, but which was never made a part of the record.

Thirteen states participated in the Commission proceeding. Neither these, the District of Columbia, nor the nine other states served by the railroads involved in this case, which together represent a population of approximately 100 million, oppose prompt consummation of the merger. Four of the states appear as appellees and urge the Court to permit prompt consummation. (p. 30, *infra.*)

B. The Commission properly found that the legal issues raised by the railroad appellants involve ancillary matters which can be effectively determined after the merger without adverse effect upon the public interest. (p. 33, *infra.*)

While recognizing that the merger is in the public interest, the United States questions the wisdom of the Commission's procedures. It suggests that this Court hold this case for an indefinite period pending further determinations by the Commission. There is no warrant to substitute such a procedure for carefully designed provisions which would permit the merger to go forward with adequate protection for all. (p. 38, *infra.*)

C. Continuance of the New Haven's services is essential to the public interest. They cannot be continued unless the New Haven is made part of the merged system. (p. 39, *infra.*)

Further delay in consummation of the merger poses a substantial threat that the merger will abort. In that event, the New Haven would be unable to survive. Such a frustration of the public interest in continuing the New Haven's essential operations should not be condoned. (p. 41, *infra.*)

III. ARGUMENT

THE APPELLANTS HAVE MADE NO SHOWING THAT THE COMMISSION AND THE DISTRICT COURT WERE CLEARLY WRONG IN CONCLUDING THAT THE PUBLIC INTEREST REQUIRES CONSUMMATION OF THE MERGER WITHOUT FURTHER DELAY.

While the facts are complicated, and the contentions of the eleven appellants and the United States run the gamut of ingenuity, the issue on which the case turns is simply phrased:

Has it been shown that the Commission and the district court were clearly wrong in concluding that the public interest lies in consummation of the Penn-Central merger without further delay, notwithstanding that there are ancillary matters yet to be considered and determined by the Commission?

Of the six appeals, and the separate position expressed by the United States, only Shapp and Scranton question whether the Commission should have approved the merger. Neither the other appellants nor the United States oppose ultimate consummation of the merger; each purports only to seek delay.

No appellant has established that the Commission failed properly to determine the public interest. Each railroad appellant is essentially concerned with its private financial interests to which the Commission and the district court correctly refused to subordinate the public interest. After painstaking consideration by the Commission and thorough review by the district court, each concluded that the public interest lies in prompt consummation of the merger. This conclusion is fully sustained by the record.

A. THE PUBLIC INTEREST IN PROMPT CONSUMMATION OF THE MERGER SHOULD NOT BE SUBORDINATED TO THE APPELLANTS' PRIVATE INTERESTS.

1. NO FURTHER DELAY SHOULD BE PERMITTED.

The Commission has twice found that the public interest requires consummation of the merger without delay. The petitions for reconsideration of the Commission's determination and the subsequent litigation have, however, already added nine months of delay to the initial determination.

The district court affirmed the Commission's finding as to the public interest, considered the delay which has already occurred, and emphasized that:

> "The long delay to which the applicants have already been subjected argues strongly in favor of letting them get ahead with the job, as the Commission unanimously thought, rather than against it." (opinion, 17)

Both the district court and responsible agencies of the Executive Branch of the United States have supported the Commission's finding that the public interest requires that the merger should be consummated promptly.

The district court said:

> "Even on the usual tests it is altogether plain that to enjoin consummation of the merger pending proceedings on reconsideration would cause certain and substantial damage to PRR, NYC and the public, whereas the most that any of the plaintiffs has made out is a conjectural possibility of harm in the interim and that small in amount . . ." (opinion, 32)

Notwithstanding the appearance of the United States in this Court with the appellants, the Executive Branch of the United States, according to the Memorandum filed herein, is in full accord with the Commission:

"Finally, we emphasize that, in questioning the Commission's procedure, we do not quarrel with the merits of the Penn-Central merger proposal itself. Indeed, the agencies of the Executive Branch that have substantive responsibilities for the formulation of economic and transportation policy believe that the merger is in the public interest and that its consummation should be promptly effected. They point out that the railroad industry of the Northeast is in urgent need of rapid modernization and believe that, as a practical matter, substantial consolidation among existing systems will be necessary to achieve this end." (Memorandum, 21-22)

Appellants' contentions, and the suggestion for delay advanced by the United States,[31] must be tested against these public interest findings.[32] As to each assertion, the appellant must establish that its claim significantly affects the public interest, and that the Commission and the district court did not effectively protect the public interest in that regard.

Each of the appellants' claims was appraised and dealt with by the Commission in its report of September 16, 1966. Where the public interest required modi-

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[31]The procedure suggested by the United States is wholly unrealistic. In essence, the Court would become an informal party to the administrative proceedings by refraining from deciding this case until the administrative proceedings progress to a stage which the United States would consider acceptable. In view of the unequivocal position of the agencies of the Executive Branch that have substantive responsibilities and direct concern in the area affected by this case, it is impossible to understand how the national interest is furthered by this suggestion.

[32]The district court viewed the question of delay on a realistic basis: "We do not suggest the country will perish if these roads, which have lived apart for more than a century, and even for four and a half years since their engagement, must continue to do so pending Commission reconsideration and judicial review. But what is in the public interest eventually is in it now unless there are truly significant considerations on the other side." (opinion, 17)

fications of the protective pattern being created, the Commission instituted further administrative proceedings, and has, in fact, substantially completed them. To the extent that such additional proceedings might extend beyond the time of consummation of the merger, the Commission found that the public interest required that consummation of the merger should nonetheless proceed without delay.

The district court approved this procedure:

> "The Commission is to be commended rather than criticized for its imagination in fashioning new conditions to deal with new cases, for its willingness to take a fresh look at these when significant objections were offered, and for its constructiveness in then designing a procedure that would permit the merger to go forward in the meanwhile with adequate protection to all." (opinion, 31)

2. FURTHER DELAY IS SOUGHT FOR PRIVATE INTERESTS.

The history of the participation, or designed inaction, of each of the railroad appellants, both in the prior proceedings involving Eastern District restructuring, as well as in this proceeding, reveals that their contentions are based on the furtherance of their private interests. The district court concluded:

> "The Commission surely can appraise far better than we what effect a year's delay of consummation would have on the jockeying of these roads and of the three plaintiffs in the C&O, B&O and N&W actions for price and position in respect of other mergers — which, despite all the words, is what we suspect these actions to be mostly about." (opinion, 32)

The interests that will receive the primary benefit from a delay in consummation of the Penn-Central merger are those of the security holders of the railroad appellants and not the interests of the public in appellants' continued ability to render adequate rail service.

For some appellants, delay keeps alive a bargaining advantage which draws its strength from preventing the merger from being consummated before inclusion of E-L, D&H and B&M in N&W or Penn-Central has been effected.

For other appellants, the objective is a delay until the Commission approves the merger of N&W with C&O. Insofar as N&W and C&O are concerned, a delay has the same effect as a consolidation for decisional purposes of their proposed merger with the Penn-Central merger. A similar attempt, which was then stoutly resisted by C&O, was summarized by the district court in *Brotherhood of Maintenance of Way Employees* v. *United States, supra.* In upholding the Commission's order approving the control of B&O by C&O, the court said:[22]

> "The efforts of the plaintiffs here to set aside the Commission's order is bottomed primarily upon a contention that the problems of all the railroads in the northeast quadrant of the United States should be considered together. In our view, such a program would be but a return to a policy that, after long frustration, was found to be unwise, both by the studies made by the Commission and by the Congress of the United States."
>
> * * *
>
> "We cannot predict at this time how many months or years would be consumed in trying to find the perfect, or merely a better, solution of the problems of our eastern railroads, large and small. As stated by Justice Jackson, reviewing the failure of a nationwide plan, 'waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements'. [citation omitted] The Commission is satisfied that the approval of the application before it involving the C&O and B&O will be a definite step forward in solving this great

[22] 221 F. Supp. at 30.

national problem. We are not persuaded that the Commission is wrong. In all events, it is not our function to substitute our judgment for that of the Commission."

The railroad appellants' desire to enhance the interests of their security holders is quite understandable. However, the Commission and the district court properly subordinated these interests to those affecting the public.

The applicable statutory guidelines do not integrate the protection of investors with the determination of public interest.[34] The Commission can approve a railroad merger if it finds that it "will be consistent with the public interest." (49 U.S.C. §5(2)(b)) The statute specifies the matters which are to be weighed by the Commission in determining whether the merger is consistent with the public interest. (49 U.S.C. §5(2)(c))

The matters required to be considered are: (i) the effect on "adequate transportation service to the public," (ii) the effect "on the public interest of the inclusion, or failure to include, other railroads in the territories involved," (iii) the fixed charges which would result, and (iv) the effect upon employees. None of these specific considerations requires a determination of the impact on investors. The reference to "fixed charges" is to insure that a Section 5(2) transaction will not result in a capital structure which could adversely affect the ability of the carrier to perform its service.

The National Transportation Policy (49 U.S.C. preceding §1) provides that all of the provisions of the Interstate Commerce Act shall be administered and en-

[34] Compare, for example, the Public Utility Holding Company Act of 1935 (15 U.S.C. §79), and the Investment Company Act of 1940 (15 U.S.C. §80a).

forced with a view to carrying out that policy. Nowhere in the detailed specification of considerations and objectives in the declaration of the national transportation policy is the protection of investors specified as one of the factors.

This distinction between the public and private interest was clearly delineated by Judge Weinfeld in his concurring opinion in *Gruss, et al.* v. *United States,* in which he considered it appropriate to distinguish his dissent in the district court in the present case.[35] He said:

> "Inclusion of New Haven to assure adequate freight and passenger service reflects the overriding public interest. [footnote omitted] The future determination of the particular terms thereof will not affect the public interest, although to be sure security holders, creditors and others who have a financial stake in New Haven's existence will be affected . . . And even if, unrealistically, we assume that both the Commission and the Reorganization Court will foist upon these plaintiff bondholders terms detrimental to them, [footnote omitted] it does not follow that the public interest served by the New Haven will be adversely affected . . ."[36]

This concept of the public interest is supported by *New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 25 (1932), where the Court said:

> " . . . the term 'public interest' . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities . . . "

[35] 66 Civ. 3413 and 66 Civ. 3425, S.D. N.Y. (November 28, 1966) determined by a three-judge court constituted of the same judges as the present case, and involving the same reports and orders of the Commission. Judge Weinfeld's concurring opinion is attached hereto as Appendix A.

[36] Appendix A, p. A2.

The public interest in adequate transportation, as contemplated by the statute, and the financial objectives of the security holders of carriers furnishing that transportation, can often be mutually served. For example, the Commission has found that the public interest would benefit from the Penn-Central merger; by their approval of the merger, the security holders of Penn-Central consider they also will benefit. Similarly, the Commission has found that the public interest requires inclusion of the New Haven in the Penn-Central system; the Trustees also consider that there is no alternative more beneficial to the interest of the New Haven's creditors and claimants. While the advancement of private interests may motivate proposals which prove to be in the public interest, the Commission's responsibilities do not permit it to subordinate the latter.

3. THE PUBLIC'S INTEREST IN PROMPT CONSUMMATION IS CLEARLY DEMONSTRATED.

No better justification of the Commission's findings with respect to the public interest is available than the reactions of representatives of the public directly affected by those findings. The position of the railroad appellants in this instance is without support from any public body, notwithstanding the large areas of the Eastern District in which the railroad appellants compete directly with Penn-Central. For example:

State	*Railroads in this proceeding furnishing service*
New York	Penn, Central, New Haven E-L, D&H, N&W, C&O-B&O
Pennsylvania	Penn, Central E-L, D&H, N&W, C&O-B&O Reading, WM, CNJ
Illinois	Penn, Central E-L, N&W, C&O-B&O C&EI

State	*Railroads in this proceeding furnishing service*
Indiana	Penn, Central E-L, N&W, C&O-B&O C&EI
Ohio	Penn, Central E-L, N&W, C&O-B&O
Michigan	Penn, Central N&W, C&O-B&O
Maryland	Penn N&W, C&O-B&O WM

In addition, one or more of the railroads in the present proceeding serve Missouri, Kentucky, West Virginia, Delaware, New Jersey, Vermont, Massachusetts, Connecticut, Rhode Island, Iowa, Nebraska, Virginia, North Carolina and the District of Columbia.

Thirteen states participated directly or through their regulatory agencies in the Commission proceeding.[37] None opposes prompt consummation of the merger, and four appear in this Court as intervening defendant-appellees to urge such prompt consummation.

Over 90 states, cities, towns, boroughs, counties, regulatory commissions, and other public agencies participated in various stages of this proceeding. Of these, only one, Scranton, objects to prompt consummation of the merger. This result must be considered conclusive of where the political representatives of the public consider the public interest lies. On a population basis, the result is even more impressive, since the population of the thirteen states represented in the Commission

[37]These were the states of New York, Pennsylvania, Michigan, New Jersey, Illinois, Connecticut, Rhode Island, Massachusetts and New Hampshire; and the Maine Public Utilities Commission, the Vermont Public Service Board, the Public Utility Commission of Ohio and the Indiana Public Service Commission.

proceeding, directly or through their regulatory agencies, exceeds 75,000,000, in contrast with Scranton's 111,000.[38]

Shapp and Scranton claim that the economic justification for the merger no longer exists and that the Commission failed in various ways properly to administer the statute. It is submitted that the Commission considered and properly disposed of these contentions in its September 16, 1966 report (328 I.C.C. at 307-310), and that they require no further comment. The district court, including the dissenting judge, found no merit in their contentions.

The position taken by the public bodies as to their interests wholly sustains the results reached by the Commission in an administrative proceeding that commenced over four years ago, in which some 450 witnesses testified and which compiled what may be one of the most massive records ever made before any administrative agency.[39]

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[38]1966 World Almanac, reflecting the 1960 census. In addition to the states so represented, Missouri, Iowa, Nebraska, Kentucky, West Virginia, Virginia, North Carolina, Maryland, Delaware and the District of Columbia, having an aggregate population in excess of 25,000,000, are also served by one or more of the railroads involved in this proceeding; none opposes prompt consummation of the merger.

[39]It has been estimated that the record involves some 40,000 pages of transcript, sworn statements, and exhibits. The administrative hearings required 128 days in 1962 and 1963, and additional time in 1964. There were some 250 parties to the administrative proceeding. Hearings were held in Washington and in:

New York:	New York, Buffalo, Rochester and Syracuse
New Jersey:	Newark
Illinois:	Chicago and Charleston
Michigan:	Detroit and Kalamazoo
Ohio:	Cleveland and Columbus
Indiana:	Fort Wayne and Logansport
Pennsylvania:	Philadelphia and Pittsburgh
Massachusetts:	Boston
Missouri:	St. Louis

B. RAILROAD APPELLANTS FAIL TO ESTABLISH THAT THE COMMISSION'S DEFERMENT OF ANCILLARY MATTERS ADVERSELY AFFECTS THE PUBLIC INTEREST.

1. DEFERRED MATTERS MAY BE EFFECTIVELY DETERMINED AFTER THE MERGER.

Under Section 5(2)(b) of the Interstate Commerce Act, the Commission may, in its discretion, approve a proposed transaction such as the Penn-Central merger upon such terms and conditions and with such modifications as it finds to be just and reasonable. Pursuant to this authority, the Commission found that E-L, D&H and B&M, which participated actively throughout its proceedings, required protection after the merger "to obviate impairment or serious weakening . . . or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections" (327 I.C.C. at 532), and established an elaborate protective scheme.

Under the protection now provided for E-L, D&H and B&M:

(1) Penn-Central must observe specified business practices designed to prevent diversion of traffic from these roads until determination of their inclusion in either the N&W system or the Penn-Central system (328 I.C.C. at 327);

(2) hearings have been completed to determine (a) in what respect, if any, the traffic conditions should be modified, (b) what, if any, current indemnification provision is needed to compensate for loss of traffic which occurs notwithstanding the traffic conditions, and (c) whether or not capital loss indemnification should be required (*Id.* at 328);

(3) any conduct by Penn-Central frustrating the purposes of the protection will render the merged system subject to prescribed recourse and, if need be, to substantial revision of the approval order (*Id.* at 327);

(4) E-L, D&H and B&M and Penn-Central may, subject to Commission approval, enter into voluntary agreements for traffic protection (*Id.* at 329);

(5) Penn-Central will be bound by all traffic conditions and any current indemnity fixed by the Commission (*Id.* at 328);

(6) the so-called standard traffic protective conditions will also apply (327 I.C.C. at 563);[40] and

(7) complaints of violations of the conditions and reviews thereof will be processed on a time schedule requiring initial determination within 10 days and final decision within 90 days. (*Id.* at 562-563)

The Commission's treatment of protective conditions is attacked by the railroad appellants on various legal grounds. Thus, it is asserted, with varying degrees of specificity, that deferring full determination of protective conditions denies due process; that the protective conditions provided are inadequate as a matter of law; that the Commission violated the Administrative Procedure Act; that the Commission failed to assess the impact of the protective conditions on the "unprotected" carriers; that the Commission failed to consider essential terms and conditions; that the Commission's action is not permitted by Section 5(2) of the Interstate Commerce Act; and, finally, that judicial review

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[40] *Detroit, T.&I.R. Co. Control*, 275 I.C.C. 455 (1950), *aff'd sub nom., New York, C. & St. L. R. Co.* v. *U. S.*, 95 F. Supp. 811 (N.D. Ohio 1951).

of protective conditions can only be effective before the merger is consummated.

The legal technicalities raised by the railroad appellants have failed to establish that the Commission's action was improper under the statute or has exposed the public interest to substantial and immediate impairment.

The district court summarized the effect of the contentions regarding protective conditions as follows:

> "The plaintiffs say that by leaving these open for future determination in important particulars, the Commission did not do what Congress required before it can lawfully approve a railroad merger." (opinion, 20).

The court concluded as to this fundamental issue that:

> "We find no such categorical imperative in the Interstate Commerce Act. Section 5(9) expressly provides that the Commission may 'from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.' Moreover, orders under § 5(2) have regularly retained jurisdiction, as did that initially issued here, 'for the purpose of making such further order or orders herein as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in said report of the Commission and to those orders which may be issued under section 5(9) of the Interstate Commerce Act.' The validity of the Commission's authorizing carriers to take action while retaining jurisdiction to impose conditions in the future is strongly sustained by *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951); *American Trucking Ass'ns, Inc.* v. *United States*, 355 U.S. 141, 154 (1957); and *American Trucking Ass'ns, Inc.* v. *Frisco Trans. Co.*, 358 U.S. 133 (1958). We are unable to follow our dissenting brother's distinction of these decisions; indeed they seem *a fortiori*

since they sustain the validity of a reservation of power to impose conditions against challenge by the carrier on whom they are imposed whereas here that carrier will have consented." (opinion, 20-20a)

Attacking the procedures used, the railroad appellants suggest that the questions which have been deferred until after the merger is consummated cannot then be effectively determined by the Commission. No appellant, however, does more than speculate that this will arise. The Commission, on the contrary, says that it can make effective determinations and the district court agreed. This conclusion is fully supported: Penn-Central has accepted irrevocably every future modification in conditions fixed by the Commission, subject only to a right of judicial review on the capital loss.indemnity issue.[41] (328 I.C.C. at 329)

Only if the Commission is permitted to employ procedural flexibility of the nature it has utilized in this case can it carry out its responsibilities in administering Section 5(2) consonant with national transportation policy, as required by law.

The scheme of Section 5(2) is to determine whether the public interest in the adequacy of service rendered the public will be adversely affected by the proposed transaction. In meeting its obligations to develop, coordinate and preserve a national transportation policy, the Commission can condition its approval so as to prevent or minimize the adverse impact of the proposed transaction upon a non-participating carrier's ability

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[41]In the recent further hearings in this proceeding on the issue of capital loss indemnification, E-L and D&H took the position that no such indemnification would be required if they were included in the N&W system. (Tr. 20,068, 20,073) Every other railroad appellant either opposed such indemnification in principle or took no position. (Tr. 20,096, 20,102, 20,104, 20,105-20,106)

to serve the public, or it can even require that the participating carriers be forced to accept the non-participating carrier as a partner to the transaction. All such conditions must be designed with the purpose of insuring for the public a national transportation system adequate to meet its needs, and no approval can be granted which does not satisfy this objective.

Contrari-wise, the Commission is not required to save an affected carrier's security holders harmless from the financial results of a Section 5(2) proposal; but it is required to protect that carrier's ability, to the extent necessary, to preserve such of its service as is needed in the public interest. Because of this statutory responsibility, the Commission's freedom of action must not be fettered, under changed circumstances, to determine whether particular conditions continue to achieve the intended objective, to promulgate new conditions, and to fix the time when such conditions must take effect.

The procedures which the Commission has employed must be evaluated in this context. There is neither mandate nor warrant for devising a "bundle of protection" which will remain unalterable. Just as changes in the developing Eastern railroad structure require constant reassessment of where the public interest lies, so too must the Commission be free to re-evaluate the protection it has granted in order to determine whether the public interest continues to be subserved.

Similarly, where carriers for which protection was not originally considered necessary by the Commission raise more than colorable claims addressed to the public interest, the Commission should be free to appraise these contentions under its power of reserved jurisdiction. Here, such contentions include claims that the conditions which the Commission may impose for the benefit of E-L, D&H and B&M could adversely

affect the other railroad appellants. These contentions illustrate the need for procedural flexibility on the part of the Commission which the district court recognized was an essential incident to the Commission's fulfillment of its statutory responsibility.

2. THE COMMISSION'S JUDGMENT AND EXPERIENCE WARRANT JUDICIAL SUPPORT.

Apart from the technical attacks made by the railroad appellants on the Commission's findings, the United States questions the wisdom of the Commission's procedures in permitting the merger to be consummated before it has decided the ultimate destiny of E-L, D&H and B&M, or the detail of interim protection for all the smaller railroads, including the New Haven.

The Commission made clear, in establishing the pattern of protective provisions for E-L, D&H and B&M, that it had not overlooked the important question of their ultimate future. It considered that the sector of public interest involved in their contentions was not paramount:

> "We recognize that we cannot at this time guarantee absolutely that E-L, D&H and B&M will be included in a major rail system on terms which they find satisfactory. However, we do not believe that this uncertainty is one which justifies postponement, perhaps for several years, of large public benefits which will flow from applicants' merger." (328 I.C.C. at 312).

On analysis, the position of the United States is that its judgment on transportation matters should be substituted for that of the Commission. This assertion disregards the express congressional delegation to the Commission of primary responsibility for the determination of national transportation policy and the administration of this statute. Furthermore, the Memo-

randum of the United States (at p. 21) concedes that "the agencies of the Executive Branch that have substantive responsibilities for the formulation of economic and transportation policy believe that the merger is in the public interest and that its consummation should be promptly effected."

In the C&O-B&O appeal, the district court considered a contention of the United States parallel to its present position, and refused to upset the Commission's procedure:

> "We cannot predict at this time how many months or years would be consumed in trying to find the perfect, or merely a better, solution of the problems of our eastern railroads, large and small . . . it is not our function to substitute our judgment for that of the Commission. *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 188, 80 S.Ct. 229, 4 L.Ed. 2d 223. The Commission's wisdom and experience, not ours, must determine whether its approval of the C&O-B&O affiliation is consistent with the public interest. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87, 64 S.Ct. 370, 88 L.Ed. 544." (211 F. Supp. at 30)

C. FURTHER DELAY POSES A SUBSTANTIAL THREAT THAT THE MERGER WILL ABORT AND THAT THE PUBLIC INTEREST IN SURVIVAL OF THE NEW HAVEN'S ESSENTIAL OPERATIONS WILL BE FRUSTRATED.

1. THE NEW HAVEN'S ESSENTIAL SERVICES CAN ONLY BE SAVED AS PART OF THE MERGED SYSTEM.

No issue is more directly and urgently addressed to the public interest than that concerning the survival of the New Haven's essential freight and passenger services. Any delay in consummation of the merger necessarily creates a risk that the merger will abort and that the New Haven will be forced to liquidate its properties.

The record is clear that the New Haven's services to the public of the four states in which it operates are

essential and must be continued. Despite its importance to the economy and people of southern New England, the New Haven cannot survive as an independent railroad:

> "Without some radical change in circumstances, even if this merger application were denied, NH would face a nearly insuperable task in bringing itself out of bankruptcy." (327 I.C.C. at 522)

The New Haven's services can be continued on a permanent basis only if its operations are included in a merged Penn-Central. Thus, the Commission stated:

> "Inclusion of New Haven's vital passenger and freight operations in the merged company, as we have provided, is the only solution which has been proposed for continuance of that bankrupt carrier's operations . . . Absent the applicants' merger we see no solution to the New Haven problem. Certainly, neither of the applicants separately can be required to take over New Haven's deficit-ridden operations." (328 I.C.C. at 312)

The immediacy of the problem was recently expressed by Circuit Judge Robert P. Anderson, sitting by designation in the New Haven's reorganization proceeding. In authorizing the Trustees to proceed with a plan of reorganization based upon inclusion, the court noted that the New Haven's operations are eroding its owners' equity and raise grave questions of whether the creditors' property is being taken without just compensation:

> "Were there no alternatives available, on proceedings initiated by the creditors, liquidation would be called for. Nevertheless, at the present moment, liquidation, close as it may be, cannot presently be entertained as a reasonable alternative . . . [S]o long as there is a reasonable possibility that the New Haven can be sold and then operated as part of a

trunk line system, like the Penn-Central, a plan of reorganization, designed to that end, is in the best interests of all concerned, including the bondholders."[42]

2. FURTHER DELAY IMPERILS NEW HAVEN'S INCLUSION.

Since the only alternative to the New Haven's inclusion is liquidation, the Commission considered that any action creating a risk of non-inclusion would be against the public interest. The district court agreed:

> "There is no dispute that the provision compelling inclusion of . . . [the New Haven] property, vitally needed but lacking vitality, is strongly in the public interest . . . If a temporary injunction would imperil or even seriously delay NH's inclusion, this would indeed weigh most heavily against it." (opinion, 18)

The district court did not base its denial of a stay on the fear that it might seriously *delay* the New Haven's inclusion since, as the New Haven advised the court, its inclusion proceedings under Section 5(2) and Section 77 of the Bankruptcy Act could go forward during the term of any stay. The district court did not have to reach the more serious question raised by the Commission's findings of whether a "temporary injunction would imperil" the inclusion, because it found that the plaintiffs were not entitled to an injunction.

A delay in consummation of the merger *imperils* the New Haven's inclusion and, consequently, risks its liquidation, in two ways. Most importantly, a stay endangers the merger itself. In addition, even though the merger should eventually take place, a stay of indefinite

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[42]Memorandum of Decision on Petition for Order No. 404, United States District Court for the District of Connecticut, *In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor*, No. 30226, October 24, 1966. This decision is attached as Appendix B hereto.

duration creates the risk that the New Haven will be unable to continue deficit operations for lack of cash resources, while awaiting consummation of a merger which cannot be assured.

In its September 16, 1966 report, the Commission put the problem in the clearest terms:

> "If consummation of the applicants' merger is deferred several years or indefinitely, we can have no assurance that it will ever occur. The factors that enter into an agreement to merge sooner or later can be affected by changing conditions." (328 I.C.C. at 312)

This is particularly true in the present case which involves an exchange of stock at a fixed ratio; the merger depends upon the continued fairness of the ratio. Neither Penn nor Central can, without stockholder approval and further Commission proceedings, modify the exchange terms. The longer consummation of the merger is delayed, the greater is the exposure of the exchange ratio to changes in circumstances. The relative worth of two companies based on an exchange ratio cannot remain immutable; the managements of each company must separately determine its business questions, and must react to such matters as cyclical changes in the economy, opportunities for diversification, hiring, firing and morale of personnel, construction programs and commitments, and a myriad of other factors which affect day-to-day business decisions. Should circumstances require the exchange ratio to be altered, or should changes in circumstances otherwise affect the basic premises of the merger, it is unlikely that Penn and Central will seek to begin anew the lengthy corporate and administrative process involved in fixing new terms.[43]

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[43]Compare N&W's position, note 24, *supra*.

Among appellants, only E-L attempts to meet this issue directly. It admits that "if a delay is long enough it may eventually thwart a merger." (Brief, 72) E-L nevertheless attempts to minimize the danger. It argues: "The risk that changes in the near future would upset the merger is so miniscule as not to be entitled to any consideration." (Brief, 74) E-L's prediction for "the near future" begs the question. A change in circumstances can occur at any time, and the risk is that one does not know when it will occur.

E-L's argument also implies that there is no prospect in this case of a lengthy deferment if the merger should be delayed. In considering this very point, the Commission said: "We are not prepared to take this risk involved in a substantial postponement of consummation of the merger." (328 I.C.C. at 312) The Commission carefully spelled out what it considered to be an undue risk in present circumstances, going on to say: "Moreover, we are not prepared to take the risks which delay of consummation of even 6 or 12 months might entail . . ." (*Id.*)

The district court was similarly unwilling to accept sanguine predictions that any delay pending reconsideration of the protective conditions would be minimal:

> ". . . any estimate of the delay incident to enjoining the merger pending reconsideration must take account of the near inevitability of requests for reconsideration of the modified conditions and renewed court proceedings." (opinion, 26)

E-L also argues that there have been differences in earnings between Penn and Central since 1961, and that no stockholder has attacked the exchange ratio. E-L then points out that, in fact, the stockholders of both companies ratified the exchange ratio on July 21, 1966. However, E-L fails to recognize that it was after such

ratification that the Commission found that it was not willing to expose the merger to the risks of a change in circumstances. (328 I.C.C. at 312)

As E-L recognizes, in the first 6 months of 1966, as contrasted with the comparable period of 1965, Central's net income had increased 80.12%, while Penn's net income had improved 32.61%. Earnings statements for the year 1966 will presumably be made available in the ordinary course of business early in 1967. It cannot now be assumed those figures will have no bearing upon whether the exchange ratio remains appropriate. The magnitude of the risk of the merger being upset depends on the likelihood of any stockholder contesting the ratio. The existence of a recent ratification of the ratio by a majority of the stockholders would not prevent such an attack; nor would it prevent a showing, depending upon the magnitude of the change in circumstances, that the terms of the merger have become unfair.

If it could be assured in advance that there would be a merger, the New Haven would be less concerned with a delay necessary to complete consideration either of the terms of the protective conditions as sought by other carriers or of the terms of its own inclusion.

This assurance has not and cannot be given. However, once the merger has been consummated, the New Haven's right to inclusion becomes fixed and enforceable. Only then is its problem solved. Delay, on the other hand, jeopardizes the solution to the New Haven problem which the merger would provide.

The United States and several appellants have attempted to obscure the effect of delay by claiming a disagreement between the Commission and the district court on the impact of a further stay on the New Haven,

citing the court's statement that: "We therefore do not rest heavily on what plaintiffs too derisively term the New Haven panic button." (opinion, 19)

The decision of the court reveals no such disagreement with the Commission. Both found that the public interest required prompt consummation of the merger. Both agreed that the provision for inclusion of the New Haven was strongly in the public interest.

The Commission particularly emphasized the danger that further delay would imperil the merger. (328 I.C.C. at 312) The court was also of that view,[44] but addressed itself to a somewhat different problem. It considered whether even a short delay in consummation might require interim liquidation of all or part of the New Haven's operations. The court sought to determine the attitudes of the states regarding the New Haven's cash problems in order to appraise the risk of interim liquidation.[45] In not resting "heavily" on the "panic button," it is clear that the court was not discussing the risk to the New Haven that the merger would not occur, but whether the New Haven could survive a short delay. The court could not otherwise have concluded that:

> "the unanimous finding of the Commission that the PRR-NYC merger conditioned on inclusion of NH is in the public interest, well supported and largely unassailed, should give a sufficient measure of the assurance [to governmental bodies and creditors] required." (opinion, 19)

The United States and the appellants appear to accept the 9 months of delay which has already occurred as being of no significance. The United States sug-

[44]See, *e.g.*, remarks of Circuit Judge Friendly: ". . . I agree, of course, that [in] an indefinite postponement of the merger you are gambling there may never be a merger . . ." (R.284)

[45]R.287, 290, 290

gests (Memorandum, 32): ". . . that the Court . . . hold the case for a reasonable time after the scheduled arguments to enable the Commission [to conclude] . . . the related proceedings." The context reveals that "related proceedings" encompass inclusion of E-L, D&H and B&M in N&W, as well as the effect on all other carriers in the Eastern District, and that the United States conceives that this might require an unspecified interim period during which some of these railroads might have to be preserved and somehow strengthened as independent carriers before being acceptable for inclusion in some system. Under this vague concept of a "reasonable time," the delay of the Penn-Central merger might well entail years.

CONCLUSION

For the foregoing reasons, it is urged that the Court terminate the stay now in effect and permit the merger to be consummated without further delay.

Respectfully submitted,

JAMES WM. MOORE
ROBERT W. BLANCHETTE
JAMES W. GRADY
54 Meadow Street
New Haven, Connecticut
06506

JOHN N. WORCESTER
ARTHUR BLASBERG, JR.
ROBERT G. BLEAKNEY, JR.
MORRIS RAKER
225 Franklin Street
Boston, Massachusetts
02110

Of Counsel

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

Attorney for Appellees,
Richard Joyce Smith and
William J. Kirk,
Trustees of the property of
The New York, New Haven
and Hartford Railroad
Company, Debtor

December 30, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OSCAR GRUSS & SON, PLAINTIFF, v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS.	66 CIV. 3413
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, PLAINTIFF, v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS.	66 CIV. 3425

I join in the opinion of the Court. However, I deem it appropriate to note an additional distinction between this case and *Erie-Lackawanna R.R.* v. *United States*.[1] In the *Erie* case the Commission found that the public interest required protection of the three carriers against the adverse effects of the merger,[2] and as a condition of consummation imposed specific protective terms[3] which it subsequently revoked ex parte, in my view without adequate supporting findings, as to one condition and left for future determination as to others.[4] The terms and conditions as originally delineated by the Commission were a sine qua non of the merger.

[1] 66 Civ. 2860, S.D.N.Y., October 4, 1966.
[2] 327 I.C.C. 475, 529, 532 (1966).
[3] *Id.* at 532, 547 (1966).
[4] 328 I.C.C. 329 (1966).

In the instant case the Commission found that the overriding public interest requires the inclusion of New Haven, but left to the parties themselves, the particular terms and conditions of the inclusion, subject to approval by the Commission and the Reorganization Court.[5] Should the parties fail to agree, the Commission has retained jurisdiction to impose terms and conditions and the consummation of the merger by Penn-Central constitutes assent thereto; in addition, the matter is still subject to approval by the Reorganization Court.[6]

The Commission recognizes that the Penn-Central merger "could undoubtedly wean substantial traffic away from New Haven and leave that already moribund carrier in perhaps an irretrievable situation"[7] Inclusion of New Haven to assure adequate freight and passenger service reflects the overriding public interest.[8] The future determination of the particular terms thereof will not affect the public interest, although to be sure security holders, creditors and others who have a financial stake in New Haven's existence will be affected. If creditor and other interests are dissatisfied with the terms and conditions worked out by the Reorganization Trustee, there is the double-barrelled protection by the Commission and the Reorganization Court. And even if, unrealistically, we assume that both the Commission and the Reorganization Court will foist upon these plaintiff bondholders terms detrimental to them,[9] it does not follow that the public interest served by the New Haven will be adversely affected — on the contrary, not to include the Line in the merger may not only lead to

[5] 327 I.C.C. 527, 553 (1966).

[6] *Ibid.*

[7] 327 I.C.C. 522 (1966).

[8] 327 I.C.C. 526-27 (1966).

[9] Cf. § 77(e) of the Bankruptcy Act, 11 U.S.C. § 205(e); *St. Joe Paper Co. v. Atlantic Coast Lines*, 347 U.S. 298 (1954).

its demise and the consequent elimination of its service to the public, but may well be totally destructive of the financial interest of some classes who have a stake in its survival.

In *Erie,* on the other hand, the terms and conditions left for future determination had, in my opinion, a vital bearing upon the public interest. Those terms, according to the Commission, were essential for the protection of the smaller carriers, the shippers, passengers and the communities they serve. By revoking them without adequate findings to support the change of position, the Commission undermined its own finding that the merger was consistent with the public interest only if the safeguards were provided; by its action it brought into question the validity of its order authorizing immediate consummation of the merger. By leaving for further consideration the terms and conditions it previously held essential to consummation, it exposed the three carriers during the period the matter would be under consideration to the same adverse factors it found militated against the merger, absent adequate protective terms. In that circumstance I questioned the power of the Commission under section 5(2)(b) of the Act[10] to defer until after consummation the determination of terms "found essential to validate this merger."[11]

s/ EDWARD WEINFELD
U.S.D.J.

November 28, 1966.

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[10] 49 U.S.C. § 5(2)(b).

[11] *Erie-Lackwanna R.R. v. United States, supra* note 1, at p. 14.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

MEMORANDUM OF DECISION ON PETITION FOR ORDER NO. 404

This petition by the Trustees asks the court to grant them authority to file with the Interstate Commerce Commission a plan of reorganization under § 77 (d) of the Bankruptcy Act. The Trustees further seek the authority to proceed, under § 5(2)(d) of the Interstate Commerce Act to effect the inclusion of the Debtor's transportation system into Penn-Central, as provided by the Interstate Commerce Commission in its order dated April 6, 1966 in the merger proceedings (327 I.C.C. 475). Both the reorganization plan and the plan of inclusion rest on the assumption that substantially all of the properties of the Debtor will be sold to Pennsylvania New York Central Transportation Company (Penn-Central) in the event that the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company is consummated.

Finally, the petition seeks authority to expend the funds necessary to implement the purposes set forth in the petition, subject to a reservation of jurisdiction by this court to pass upon such expenditures.

The premise of both the reorganization plan and the plan of inclusion as proposed by the Trustees is that the terms of the sale to Penn-Central will be as set forth in an agreement among the Trustees, the Pennsylvania Railroad and the New York Central Railroad dated April 21, 1966, as amended October 4, 1966 (referred to as the Amended Agreement). The Amended Agreement has not been passed upon by the Interstate Commerce Commission and this court. It may, of course, be modified in accordance with applicable orders of the Interstate Commerce Commission, and, in any event, is subject to eventual judicial review.

The Trustees' plan is intended to preserve rail operations and to effect an early inclusion of the Debtor's transportation plant into Penn-Central. To that end, the Trustees propose a two-step plan of reorganization. Under the first step, inclusion would be effected for a consideration to be paid by Penn-Central. Upon consummation of the first step, the Debtor's estate would be relieved of any further obligations to operate as a railroad. Thereafter, the Trustees would proceed to the second proposed step: the treatment of claims against and interests in the estate.

Although they take no position on the detailed terms of the Amended Agreement, the United States and the States of Connecticut, Massachusetts, New York and Rhode Island, parties in these preceedings, support the Trustees' petition.

The bondholders generally take the position that the Trustees need no court authority to file a plan of reor-

ganization and that by making the findings and granting the relief sought by the Trustees, this court would now be prejudging the case to be heard by the Interstate Commerce Commission and reviewed by the court.

The court considers that the relief requested should be granted and that such action by the court will not impinge upon the functions of the Commission or upon the rights of interested parties to pursue their claims on the merits in proceedings before the Commission, and upon judicial review.

It is necessary to sort out, among the challenges to the petition, those which are not properly before the court at this time. In the course of the hearings, the court sought to make clear that it could not and would not approve or confirm any plan unless the plan had first been approved by the Interstate Commerce Commission and certified to the court in accordance with § 77(d) of the Bankruptcy Act. Further, the court noted repeatedly that it did not intend to usurp the traditional functions of the Commission with regard to valuation. For this reason, many of the bondholders' objections need not be passed upon in order to determine whether the Trustees' petition should be granted.

Many of the objections which centered on the Amended Agreement may thus be excluded at this point, since the merits of the agreement are not now before this court. The adequacy of the consideration to be paid by Penn-Central, or its form, are initially for the Commission to determine after the evidence and the views of all the interested parties are put before it. If the consideration agreed upon was originally too low, or if, as alleged by certain bondholders, changes in circumstances since the basic terms were negotiated require a revision in the purchase price, these claims should be raised before the Commission.

A similar conclusion may be reached as to the request that the court direct the Trustees to ask the Commission for financial indemnities or traffic conditions to preserve present freight routing, pending actual inclusion. In this respect, the Amended Agreement provides that Penn-Central will bear, with minor exceptions, the financial consequences of depreciation and obsolescence after December 31, 1963 and of operating freight losses to the extent of $5,250,000. It is for the Commission to determine in passing upon the plan for the inclusion whether these provisions adequately protect the estate for any possible losses in the time between consummation of the Penn-Central merger and inclusion of the New Haven, or whether additional terms are required.

Since the Commission may modify the Trustees' plan, consider other plans or even formulate a plan of its own, this court should not now pass upon the question of whether a two-step plan affords the only feasible means of accomplishing reorganization.

The petition does not seek an approval or confirmation which is the immediate preface to consummation of a plan, but only the very general conclusion that the proffered plan is not frivolous, irrelevant, or patently absurd, but is sufficiently reasonable on its face to justify its presentation to the Commission for serious study and consideration and to warrant the expenditure of what is needed to do so.

Since their administration of the estate is subject to the control of this court (§ 77(c)(2)), the Trustees are entitled to have the court's approval on the matter of filing, just as they have regularly sought and obtained its advice relative to other major developments. See Petitions for Order No. 109, for leave to seek inclusion in Penn-Central, and for Order No. 287, for authority

to seek discontinuance of passenger service. They have further sought the approval of this court before retaining independent experts to perform services of the kind which will be necessary here. See, *e.g.*, Petitions for Orders No. 23 (retainer of Coverdale & Colpitts), 34 and 35 (real estate appraisers), and 59 (retainer of United Research Incorporated).

Because of the substantial sums which may be involved in prosecuting their plan, the Trustees have properly asked the court to determine whether, on a *prima facie* basis, their proposal is reasonable. It is therefore necessary to consider assertions made by some of the bondholder groups that the fundamental premises on which the Trustees' plan rests are manifestly erroneous and that the plan itself contains patent and fatal defects.

Some of the bondholder groups object to any finding by the court that inclusion of the Debtor's estate in Penn-Central, as provided by the Interstate Commerce Commission order of April 6, 1966, affords a practicable means for reorganization of the Debtor that is consistent with the best interests of the public and of all parties interested in the Debtor's estate, and should be effected. The Trustees' opinion that this is so forms the basis of their plan. If their opinion is well-founded, it necessarily follows that the Debtor should be maintained as a going concern as long as the goal of inclusion remains reasonably within reach.

These conclusions should come as no surprise. That the survival of the Debtor's transportation system lay in its absorption in a trunk line was expressed by the Trustees in their first report to this court on March 5, 1962. On June 7, 1962, the Trustees requested authority to seek inclusion in Penn-Central, alleging that this

course was required "in the best interests of the public and of the Debtor" (Petition for Order No. 109). This allegation was uncontroverted; in fact, at the hearing on that petition, the indenture trustees under the two system mortgages urged that the petition be granted.

In providing for the New Haven's inclusion in Penn-Central, a unanimous I.C.C. on April 6, 1966 concluded as follows:

> "Without some radical change in circumstances, even if this merger application were denied, NH would face a nearly insuperable task in bringing itself out of bankruptcy." (327 I.C.C. 475, at 522).

Unless something cataclysmic occurs between now and the time when the I.C.C. is considering a plan or plans for reorganization, it is not likely to reach a different conclusion. The protesting bondholders have offered no evidence to show that inclusion is not a practicable means and it is difficult to see how they could.

The bondholders are aware that the recognition of interests of others, besides themselves, in the Debtor's estate may tend in varying degrees to reduce the value of their own interests, and their counsel, with a single-mindedness consistent with the duty owed to those who have retained them, oppose the consideration of such other interests and urge that all efforts of the Trustees be solely directed toward enhancing the position of the bondholders and that of no one else. There is, of course, much in the record of this case to support the proposition that the bondholders are in all likelihood the present equitable owners of the Railroad. As a public utility and a railroad in interstate commerce, however, it is necessary that the reorganization proceedings, including any plan of reorganization, give consideration to the public interest, to those who depend upon the Rail-

road for the transportation of persons and goods and to the interest the thousands of Railroad employees have in the preservation of their jobs. Both the statute and the cases interpreting it establish that interests other than those of private investors must be safeguarded. See, *e.g.*, § 77(d) (plan of reorganization must be "compatible with the public interest"); H. Rep. No. 2282, 85th Cong., 2d Sess., July 26, 1958, pp. 2, 5 (§ 77(c)(2) " . . . represents a proper balancing on the one hand of the interests of the creditors in obtaining a reorganization plan which is fair to all and, on the other, of the interests of the public in adequate transportation services and facilities."); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 60 S. Ct. 416, 84 L. ed. 558 (1940) (upholding preferential payment of employees' personal injury claims under § 77(n)); *R.F.C. v. Denver & Rio Grande W. R. Co.*, 328 U.S. 495, 535, 66 S. Ct. 1282, 90 L. ed. 1400 (1946) (noting "the duty of the Commission to plan reorganizations with an eye to the public interest as well as the private welfare of creditors and stockholders"); *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 474, 63 S. Ct. 692, 87 L. ed. 892 (1943) (plan must recognize need for an "efficient transportation system for shipper, investor and consumer").

Those who represent these other interests also tend to err by disregarding or giving little or no recognition to the basic and important interests of creditors.

As to the present petition, however, it is the bondholders who are objecting and the foregoing discussion was intended to point up that while they have a single interest and a single goal, *i.e.*, the highest possible realization on their investment, the Trustees must consider not only those creditor interests but also the public interest including the Federal Government, the States

and the municipalities and the private users and employees of the Railroad. To adopt a somewhat outdated metaphor, the bondholders are driving a single-horse rig while the Trustees must drive a multiple-horse rig.

This difference in view and approach underlies much of the structure and content of the Trustees' plan and the bondholders' objections to it. However, there is nothing to indicate that the goal of inclusion, for which the Trustees have worked for over four years, is so absurd or unreasonable that it cannot afford a practicable means of reorganization.

The finding sought is that inclusion should be effected under the provisions of the Commission's April 6, 1966 order which states that the transaction will be accomplished "upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission." This court should not attempt presently to adjudicate whether the Trustees are right or wrong in taking the position that the agreement they have negotiated provides for fair and just compensation. That question rests with the Commission, where the parties in interest will have every opportunity to be heard. The court, however, cannot assume in advance that in considering whether the terms of inclusion are fair and equitable, the Commission will fail to give due regard to the bondholders' interests. Accordingly, the court considers that the Trustees have made a sufficient showing to entitle them to the finding as to inclusion which they sought at the beginning of the hearing on their petition.

The record similarly supports a finding that railroad operations should be continued under present circumstances. From every point of view it has been consid-

ered preferable to keep the railroad operating as a going concern rather than to look toward liquidation. This has been the policy from the beginning of these proceedings and has been concurred in by the bondholders. It has been continuously hoped that the Federal Government and the States concerned, who represent the public interest, would contribute enough to compensate for the deficits incurred in performing passenger operations. While Connecticut has endeavored to make substantial contributions by relieving the Railroad of the entire burden of taxation, the others, for various reasons, have manifested a more limited interest. In 1966, funds granted at an annual rate of $5.6 million have nevertheless left the railroad with a deficit in income available for fixed charges of $4.2 million for the first eight months of the year. This deficit is a continuing charge on the shrinking assets of the estate and, in effect, reduces the amount available for its creditors.

These deficits and the constantly increasing prior liens of accumulating taxes enacted by the States, who are at the same time pleading that the continued existence of the Railroad is vital to their economy and the operation of which is saving them many millions of dollars which would otherwise have to be expended for additional super-highways and other means of transportation, raise a very serious question of whether the creditors' property can continue to be taken without just compensation. Were there no alternatives available, on proceedings initiated by the creditors, liquidation would be called for. Nevertheless, at the present moment, liquidation, close as it may be, cannot presently be entertained as a reasonable alternative. No such proceeding has been commenced and, from the record of this case, and the recognized cost in both time and money of liquidating a railroad such as the New Haven,

which for many years has been a deficit operation, the court concludes that so long as there is a reasonable possibility that the New Haven can be sold and then operated as part of a trunk line system, like the Penn-Central, a plan of reorganization, designed to that end, is in the best interests of all concerned, including the bondholders. This assumes that the terms of the plan, including compensation paid for the Debtor's estate, are "feasible, equitable, just and reasonable," a matter to be determined by the I.C.C., subject to judicial review.

The foregoing is not intended to prevent any party from seeking a reconsideration of this conclusion should the facts and the alternatives as presently known alter in any significant respect.

While it cannot approve or confirm the Trustees' plan of reorganization at this juncture, the court must consider objections that the Trustees' plan is so patently unreasonable that no expenditures should be authorized to pursue it.

Some of the bondholder groups have objected to the two-step structure of the plan because it contemplates transferring the assets of the estate free and clear of the mortgage liens without providing for an immediate payment of proceeds to the bondholders. This objection has no sound legal basis. It has long been customary in bankruptcy proceedings and in other branches of the law that property may be sold free and clear of encumbrances. The secured creditors are protected as long as adequate provision is made to impress the proceeds with whatever liens existed on the *res* and to insure that the order of priorities is maintained. Thus, property of the Debtor has been sold throughout these proceedings under the express provisions of § 77(o) of the Act. Such powers are inherent in equity practice: see *Glenn*

on Liquidation, § 233 (1935) ("[A]s to the foreclosure of liens on property in its custody, the court has all the powers of chancery. Among these is the power to sell the *res* free of liens, the latter to attach to the proceeds of sale, it being for the Court to determine the relative priorities."); 2 *Gerdes on Corporate Reorganization,* § 950 (1936). The practice has long been sanctioned in railroad receiverships and in ordinary bankruptcy. See *First National Bank v. Shedd,* 121 U.S. 74, 7 S. Ct. 807, 30 L. ed. 877 (1887); *Van Huffel v. Harkelrode,* 284 U.S. 225, 52 S. Ct. 115, 76 L. ed. 256 (1931); 4 *Collier on Bankruptcy,* § 70.97[2] (1964 ed.); 6 *Remington on Bankruptcy,* § 2577 (1952); Section 77(b)(5) (plan of reorganization may provide for "sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price."). As to admiralty practice, see 1 *Benedict on Admiralty,* § 11 (1940) ("A sale under decree *in rem* is a complete divestiture of prior liens and conveys to the purchaser a free and unincumbered title to the property, the holders of such liens being remitted to the funds in the registry which are substituted for the vessel.")

Other objections to the two-step plan are made on the basis that the statute does not contemplate such a procedure and that the entire reorganization plan, including the distribution to claimants, must be submitted and determined at the same time. In the Trustees' opinion, the two steps are necessary in order to accomplish a speedy inclusion which will relieve the Debtor's estate as soon as possible of the continuing burden of operations. Ultimately, the Commission must determine whether the plan should consist of two steps in order to preserve the maximum realization of value to interested parties. In the classic reorganization case, where continued operations are productive of earnings,

there may be no reason to separate the marshalling of assets from the satisfaction of claims against the estate. In this unique case, the court sees no legal impediment should the Commission decide that procedural ingenuity is required to meet the situation at hand, especially since there is the additional necessity to coordinate reorganization proceedings under § 77 of the Bankruptcy Act and inclusion proceedings under § 5(2)(d) of the Interstate Commerce Act. From the very general view of the plan to which the court is limited for purposes of this petition, the propriety of the Trustees' proposed procedures has sufficient merit to justify their going forward.

The objective of speedy inclusion also underlies the provision in the Trustees' plan whereby the Commission will be requested to find that consummation of the first step does not materially affect creditors and stockholders of the Debtor and that, consequently, no vote is required to carry out the first step. As a practical matter, the question of voting bears only on the amount and nature of the consideration to be paid by Penn-Central, since the New Haven has no realistic choice to affiliate with any other trunk line, as perhaps the Erie-Lackawanna, Delaware & Hudson and Boston & Maine have. Nor could the New Haven remain as an independent railroad if the Penn-Central merger is consummated. The Trustees consider that those interested in the estate will be adequately protected in Commission proceedings to determine the fairness of the compensation, subject also to judicial review, and that submission of the consideration to a vote would only delay inclusion and is unwarranted under the circumstances of this case. Some bondholders disagree. The Commission must make the determination whether a vote is necessary, but it cannot be said that the Trustees' views are

so unreasonable that this court should direct them not to seek the finding by the Commission.

The claim has been made that the expenditures sought here would be improvident since the Trustees, in signing the Amended Agreement, have estopped themselves from seeking the best value for the estate, from seeking other relief, such as the payment of indemnities, against the effects of the Penn-Central merger, or, in general, from proposing terms inconsistent with those they have negotiated.

Many of these assertions may be mooted if a speedy inclusion is achieved and the need for interim protection thus obviated. In addition, just as this court cannot approve the contract in advance of I.C.C. proceedings on the issue, it should not in essence now disapprove it by directing the Trustees to commit an anticipatory breach of its terms. The I.C.C. is empowered to review the agreement fully, to modify it and to propose different terms of inclusion as well as a different plan of reorganization should it so desire, with full opportunity to all interested parties to be heard on the merits.

Finally, representatives of the bondholder groups have suggested that, as equitable owners of the Railroad, they should be advised of the opinions of the Trustees' experts and be furnished with the evidentiary materials to be used in presentation of the Trustees' plan. Similarly, they seek to be consulted about the preparation of the Trustees' case, on the ground that it is their money which will be used to pay for expert testimony and other evidentiary material and that in seeking to support the plan, the Trustees will fall short of seeking the amount the bondholders feel they should recover. The Trustees have always been fully aware of

their responsibility for looking out for the rights of the creditors. From their testimony, it appears that they are of the opinion that the plan does so. The bondholders disagree. The primary responsibility for presenting the plan must rest with the Trustees, and they could hardly acquit their duty in this regard if they were required to carry on a running controversy with the bondholders' groups who are not in complete agreement among themselves. While the case is in the process of preparation, the suggestion is both premature and impracticable and it will not be ordered, although future developments may warrant a reconsideration of this issue at a later time.

In general, the Trustees' plan for reorganization and inclusion gives consideration to all the parties in interest and aims toward a reasonable objective. It is suitable for filing and presentation and the authority should be given the Trustees to expend funds in connection therewith, subject to the court's reservation of jurisdiction to pass on the actual expenditures.

The petition is granted; a formal order will follow.

Dated at New Haven, Connecticut, this 24th day of October, A.D. 1966.

s/ ROBERT P. ANDERSON

United States Circuit Judge
sitting by designation as
United States District Judge